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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

ST. ELIZABETH MEDICAL CENTER,

Petitioner,

v.

JIMMIE DEAN BROWNING, et al., and
CONEY MITCHELL,

Respondents.

**Petition For A Writ Of Certiorari
To The Ohio Supreme Court**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Ohio Supreme Court's abolition of the immunity conferred by Ohio Revised Code § 2305.25 constitutes a denial of due process under the United States Constitution, because it exposes Ohio hospitals to liability against which they cannot defend?

2. Whether Ohio's law as to the accrual of negligent credentialing claims, as retroactively applied by the Ohio Supreme Court, constitutes a denial of due process under the United States Constitution by denying hospitals the benefit of any statute of limitations?

3. Whether the decision of the Ohio Supreme Court in this case deprived Petitioner of its due process right to an unbiased decision maker?

PARTIES

The parties to the consolidated appeal before the Ohio Supreme Court, whose judgment is sought to be reviewed, were:

1. St. Elizabeth Medical Center,[1] which was a named defendant in the separate actions in the lower courts, *Jimmie Dean Browning, et al. v. James C. Burt, M.D., et al.* and *Coney Mitchell v. James C. Burt, M.D., et al.*, and is the petitioner herein;

2. Jimmie Dean and Lawrence Browning, Plaintiffs in their separate action in the lower courts, and who are respondents here;

3. Coney Mitchell, Plaintiff in her separate action in the lower courts, and who is a respondent here;

4. James C. Burt, M.D., who was a named defendant in *Browning* and *Mitchell*, but who is not a party to this petition because Petitioner does not believe he has any interest in the outcome of this petition; and

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[1] St. Elizabeth Medical Center, Inc., is an Ohio not-for-profit corporation, whose members (pursuant to Ohio Revised Code § 1702.13) are Franciscan Health System of Dayton, Inc., an Ohio not-for-profit corporation, and Franciscan Sisters of the Poor Health System, Inc., a Delaware corporation (whose member is Franciscan Sisters of the Poor, an Ohio not-for-profit corporation).

PARTIES – Continued

5. Max Blue, M.D., who was a defendant in *Browning* only, but who is not a party to this petition because Petitioner does not believe he has any interest in the outcome of this petition.[2]

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[2] Petitioner hereby notifies the Court and parties to the proceedings below that it believes that neither Defendant Blue nor Defendant Burt has an interest in the outcome of this petition. This petition, however, has been served upon all parties to the proceedings below. *See* U.S. Sup. Ct. R. 12.4 and 29.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES viii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

I. Background 2

A. Hospital Peer Review – an Overview 3

B. Ohio's Law as to the Accrual of Negligent Credentialing Claims Prior to *Browning* 4

II. Procedural and Factual Posture 6

A. *Jimmie Dean Browning, et al. v. James C. Burt, M.D., et al.* – in the Lower Courts 6

B. *Coney Mitchell v. James C. Burt, M.D., et al.* – in the Lower Courts 8

C. The Consolidated Appeals Before the Ohio Supreme Court 9

REASONS FOR GRANTING THE WRIT 12

I. This Court Should Decide Whether the Abolition of Peer Review Immunity for Ohio Hospitals Deprives Those Hospitals of Any Meaningful Opportunity to Defend "Negligent Credentialing" Claims and Contravenes the Vital Public Interest in Protection of Medical Peer Review 13

TABLE OF CONTENTS – Continued

Page

II. This Court Should Decide Whether the Ohio Supreme Court's "Alerting Event" Discovery Rule Governing the Accrual of "Negligent Credentialing" Claims, as Applied Retroactively, Deprives Ohio Hospitals of Due Process 16

A. The Ohio Supreme Court's Holdings as to the Applicable Statute of Limitations as Well as the "Alerting Event" Accrual Rule for Negligent Credentialing Claims Established Two New Principles of Law 17

B. The Retroactive Application of the Ohio Supreme Court's Alerting Event Discovery Rule Retards Important Policies Underlying the Statute of Limitations 20

C. The Retroactive Application of the "Alerting Event" Discovery Rule Would Be Inequitable... 23

III. This Court Should Determine Whether the Ohio Supreme Court Has Demonstrated Pervasive and Unfair Prejudice in This Case, Thus Depriving St. Elizabeth Medical Center of Its Right to an Unbiased Decision Maker and Unfairly Impacting Its Defense in Pending Cases 25

CONCLUSION 29

APPENDIX A[3]

Browning v. Burt, 67 Ohio St. 3d 1439, 617 N.E.2d 688 (Ohio, August 25, 1993) (entry denying rehearing)..... A-1

---

[3] Because they are voluminous, the appendices are presented in a separately filed volume.

TABLE OF CONTENTS – Continued

Page

Mitchell v. Burt, 67 Ohio St. 3d 1439, 617 N.E.2d 688 (Ohio, August 25, 1993) (entry denying rehearing)..... A-2

Petition for Rehearing of Appellant, St. Elizabeth Medical Center, *Browning v. Burt*, 66 Ohio St. 3d 544, 613 N.E.2d 993 (1993) (appendices omitted)..A-3

Browning v. Burt, 66 Ohio St. 3d 544, 613 N.E.2d 993 (1993)..... A-28

Jimmie Dean Browning, et al. v. James C. Burt, M.D., et al., No. CA 12176, Slip Opinion (Ohio App. August 20, 1991)..... A-77

Coney Mitchell v. James C. Burt, M.D., et al., No. CA 12244, Slip Opinion (Ohio App. August 26, 1991)..... A-91

Jimmie Dean Browning, et al. v. James C. Burt, M.D., et al., No. 89-1341 (Ohio C.P. December 5, 1989) (decision and order granting summary judgment)..... A-96

Coney Mitchell v. James C. Burt, M.D., et al., No. 88-4468, (Ohio C.P. January 12, 1990) (decision and order granting summary judgment).....A-103

Hanks v. Burt, No. 12257, 1991 WL 6312 (Ohio App., Jan. 25, 1991)..... A-108

Related Ohio Cases Pending at the Time of Publication of *Browning v. Burt*, 66 Ohio St. 3d 544, 613 N.E.2d 993 (1993)..... A-114

APPENDIX B

Provisions of the Health Care Quality Improvement Act of 1986, 42 U.S.C.A. §§ 11101, *et seq.*.....B-1

TABLE OF CONTENTS – Continued

Page

APPENDIX C

Ohio Revised Code § 2305.10 (Anderson 1991)....C-1

Ohio Revised Code § 2305.11 (Anderson Supp. 1992)..... C-2

Ohio Revised Code § 2305.25 (Anderson Supp. 1992)..... C-7

Ohio Revised Code § 2305.251 (Anderson 1991)...C-9

APPENDIX D

Fazzone v. Western Reserve Care System, No. 90 C.A. 72, 1991 WL 124428 (Ohio App. July 2, 1991)..... D-1

Raggazine v. St. Elizabeth Hospital Medical Center, No. C.A.129, 1991 WL 184817 (Ohio App. September 19, 1991).....D-5

TABLE OF AUTHORITIES

Page

CASES

Albain v. Flower Hospital, 50 Ohio St. 3d 251, 553 N.E.2d 1038 (1990) 2, 13, 24

Allenius v. Thomas, 42 Ohio St. 3d 131, 538 N.E.2d 93 (1989) 4, 5, 10, 19

American Surety Co. v. Baldwin, 287 U.S. 156 (1932) 15

Bell v. Sharp Cabrillo Hosp., 211 Cal. App. 3d 1339, 260 Cal. Rptr. 37, 41, *modified on other grounds*, 212 Cal. App. 3d 1034, 260 Cal. Rptr. 886 (1989) 18

Berdyck v. Shinde, 66 Ohio St. 3d 573, 613 N.E.2d 1014 (1993) 15

Bredice v. Doctors Hospital, Inc., 50 F.R.D. 249, (D.D.C. 1970) *aff'd*, 479 F.2d 920 (D.C.Cir. 1973) 3

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930) 12, 23

Bronson v. Sisters of Mercy Health Corp., 175 Mich. App. 647, 438 N.W.2d 276 (1989) 18

Browning v. Burt, 66 Ohio St. 3d 544, 613 N.E.2d 993, *reh'g denied*, 67 Ohio St. 3d 1439, 617 N.E.2d 688 (1993) ..... *passim*

Burness v. New York Central R. Co., 380 U.S. 424 (1965) 21

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) .. 16, 17, 25

Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968) 25

Fazzone v. Western Reserve Care Sys., No. 90 C.A. 72, 1991 WL 124428 (Ohio App. July 2, 1991) 18

TABLE OF AUTHORITIES – Continued

Page

Gardiner v. A.H. Robins, 747 F.2d 1180 (8th Cir. 1984).....27, 28

Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979)..... 13

Haines v. Liggett Group, 975 F.2d 81 (3rd Cir. 1992)....25-27

Haines v. Liggett Group, Inc., 140 F.R.D. 681 (D.N.J. 1992)..... 26

Hanks v. Burt, No. 12257, 1991 WL 6312 (Ohio App. Jan 25, 1991), *jur. mot. overruled*, 61 Ohio St. 3d 1413, 574 N.E.2d 1076 (1991).....5, 17

Harig v. Johns-Manville Products Corp., 284 Md. 70, 394 A.2d 299 (1978) 22

Hershberger v. Akron City Hosp., 34 Ohio St. 3d 1, 516 N.E.2d 204 (1987) 5, 19

Hoffman v. Davidson, 31 Ohio St. 3d 60, 508 N.E.2d 958 (1987)..... 19

In Re Murchison, 349 U.S. 133 (1955) 25

Lewis v. Curtis, 671 F.2d 779 (3rd Cir. 1982), *cert. denied*, 459 U.S. 880 (1982) 25

Lindsey v. Normet, 405 U.S. 56 (1972).....15, 16

Lombard v. Good Samaritan Medical Center, 69 Ohio St. 2d 471, 433 N.E.2d 162 (1982) 15

Mackey v. Montrym, 443 U.S. 1 (1979)..... 12, 15, 24, 29

TABLE OF AUTHORITIES – Continued

Page

Mathews v. Eldridge, 424 U.S. 319 (1976).....13, 24

Mayberry v. Pennsylvania, 400 U.S. 455 (1971)..... 25

Nickey v. Mississippi, 292 U.S. 393 (1933) 15

O'Stricker v. Jim Walter Corp., 4 Ohio St. 3d 84, 447 N.E.2d 727, 732 (1983).....20, 22

Offutt v. United States, 348 U.S. 11 (1954)..... 25

Oliver v. Kaiser Community Health Foundation, 5 Ohio St. 3d 111, 449 N.E.2d 438 (1983)..... 19

Proctor v. Southwest General Hosp., 78 Ohio App. 3d 608, 605 N.E.2d 975 (1992)..... 18

Raggazine v. St. Elizabeth Hosp. Medical Ctr., No. C.A. 129, 1991 WL 184817 (Ohio App. September 19, 1991)..... 18

Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342 (1944)..... 21

Richards v. St. Thomas Hospital, 24 Ohio St. 3d 27 492 N.E.2d 821 (1986) 19

Richardson v. Doe, 176 Ohio St. 370, 199 N.E.2d 878 (1964)..... 15

Stein v. New York, 346 U.S. 156 (1953)..... 29

United States v. Kubrick, 444 U.S. 111 (1979).....20, 21

United States v. Marion, 404 U.S. 307 (1971)..... 21

STATUTORY, CONSTITUTIONAL, AND RULE AUTHORITIES

U.S. Const. Amend. XIV, § 1..... 1, 12, 27, 29

28 U.S.C.A. § 1257(3) (West 1993)..... 1

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C.A. § 1320c (West 1991)..... 3

42 U.S.C.A. § 1395bb(a) (West 1992)..... 3

42 U.S.C.A. § 11101 (West Supp. 1993).....2, 3

42 U.S.C.A. § 11137 (West Supp. 1993)..... 4

Ohio Rev. Code § 2305.10 (Anderson 1991).....2, 10

Ohio Rev. Code § 2305.11 (Anderson Supp. 1992) 2, 4, 9, 10, 18

Ohio Rev. Code § 2305.25 (Anderson Supp. 1992) 2, 11, 16

Ohio Rev. Code § 2305.251 (Anderson 1991).....2, 14

Sup. Ct. R. 10.1 (c)..... 13

MISCELLANEOUS AUTHORITIES

A Compendium of State Peer Review Immunity Laws (American Medical Association) 1988..... 4

Ex-Patients of Burt Can Sue St. E's, Dayton Daily News, July 1, 1993, at 1A..... 27

Joint Commission on Accreditation of Health Care Organizations, *Accreditation Manual for Hospitals* (1993)..... 3

Kendall, *Expectations, Imperfect Markets, and Medical Malpractice Insurance* in THE ECONOMICS OF MEDICAL MALPRACTICE (S. Rothenberg, ed. 1978)..... 23

'Love Doctor' Can Be Put on Trial, Court Rules, Cleveland Plain Dealer, July 1, 1993, at 5B..... 27

Note, *Medical Peer Review Protection in the Health Care Industry,* 52 Temple L. Q. 552 (1979)..... 4

TABLE OF AUTHORITIES – Continued

Page

Note, *Peer Review Protection: The Pennsylvania Approach at the Crossroads,* 91 Dick. L. Rev. 329 (1986) 3

Note, *Restructuring Hospital-Physician Relations: Patient Care Quality Depends on the Health of Hospital Peer Review,* 51 U. Pitt. L. Rev. 1025 (1990) 15

OPINIONS BELOW

The judgment of the Ohio Supreme Court, entered June 30, 1993, is reported at *Browning v. Burt*, 66 Ohio St. 3d 544, 613 N.E.2d 993 (1993). (*See* Appendix, *infra*, A-28.) This judgment consolidated for decision the separate appeals from the Ohio Court of Appeals for the Second Appellate District, Montgomery County, Ohio, captioned *Jimmie Dean Browning, et al. v. James C. Burt, M.D., et al.*, Appeal No. CA 12176, and *Coney Mitchell v. James C. Burt, M.D., et al.*, Appeal No. CA 12244. The opinions of the Ohio Court of Appeals in *Browning* and *Mitchell* are unreported. (*See* Appendix, *infra*, A-77-A-95.) The opinions of the Montgomery County Court of Common Pleas granting summary judgment in *Browning* and *Mitchell* also are unreported. (*See* Appendix, *infra*, A-96-A-107.)

JURISDICTION

The judgment from the Ohio Supreme Court was rendered on June 30, 1993. A timely petition for rehearing was denied by that court on August 25, 1993, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C.A. § 1257(3) (West 1993).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. U.S. Const. Amend. XIV, § 1:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

II. Provisions of the Health Care Quality Improvement Act of 1986, 42 U.S.C.A. §§ 11101, *et seq.* (West Supp. 1993) appear in Appendix B.

III. Provisions of the Ohio Revised Code appear in Appendix C as follows:

Ohio Rev. Code § 2305.10 (Anderson 1991)
Ohio Rev. Code § 2305.11 (Anderson Supp. 1992)
Ohio Rev. Code § 2305.25 (Anderson Supp. 1992)
Ohio Rev. Code § 2305.251 (Anderson 1991).

STATEMENT OF THE CASE

I. Background

This Petition arises from two of forty-plus similar actions filed in the Court of Common Pleas, Montgomery County, Ohio. All of these cases involve claims of medical malpractice against Dr. James Burt and allegations that Petitioner, St. Elizabeth Medical Center ("SEMC"), was negligent in allowing and continuing Dr. Burt's hospital privileges (referenced by the courts and parties below as a "negligent credentialing" claim).

In Ohio, a hospital may be liable on a negligent credentialing claim if it continues a physician's hospital privileges when, through its peer review process, it knew or should have known that the physician had developed a pattern of incompetence. *See Albain v. Flower Hospital,* 50 Ohio St. 3d 251, 258, 553 N.E.2d 1038, 1045 (1990). Thus, a negligent credentialing claim necessarily involves scrutiny of the quality of an Ohio hospital's peer review process, and might more appropriately be described as a "negligent peer review" claim.

For the reasons that follow, if the Ohio Supreme Court's holdings as to Ohio's negligent credentialing laws go undisturbed by this Court, Petitioner faces trial in these cases unfairly prejudged and unable to fully defend itself in violation of the guarantees established by the Due Process Clause of the U.S. Constitution.

A. Hospital Peer Review – an Overview

The promotion of health care quality improvement through the process of hospital peer review serves patients by improving care and reducing patient injury. Peer review is a principal mechanism for ensuring the quality and appropriateness of health care, including a reduction in the incidents of medical malpractice, in the United States. *See generally* Health Care Quality Improvement Act of 1986, § 402, 42 U.S.C.A. § 11101 (West Supp. 1993) (hereafter, "HCQIA").

In general, peer review refers to attempts within the medical profession to monitor the quality of care provided by its members. In addition to self-imposed regulation, federal law mandates that health care entities engage in peer review. To qualify for reimbursement of funds expended to administer Medicare and Medicaid reimbursement, for example, a hospital must meet certain standards for peer review.[4]

The peer review process governed by individual hospital by-laws and rules is the primary mechanism available to hospitals for promoting quality health care. *See* Note, *Peer Review Protection: The Pennsylvania Approach at the Crossroads,* 91 Dick. L. Rev. 329, 337 (1986). In enacting the HCQIA, Congress specifically found that there was "an overriding national need to provide incentive and protection for physicians engaging in effective peer review." *See* 42 U.S.C.A. § 11101(5) (West Supp. 1993).

Confidentiality is essential to the effective functioning of hospital peer review. If the substance of professional peer review committee meetings were made public, physicians would be unwilling to serve on peer review committees. The entire peer review process, then, would disintegrate. *See Bredice v. Doctors Hospital, Inc.*, 50 F.R.D. 249, 250 (D.D.C. 1970) *aff'd*, 479 F.2d 920 (D.C.Cir. 1973) For this reason, all

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[4] *See* 42 U.S.C.A. § 1395bb(a) (West 1992); Joint Commission on Accreditation of Health Care Organizations, *Accreditation Manual for Hospitals*, § MS.2 (1993). Congress has also created Professional Standard Review Organizations ("PSROs") to act as peer review groups and to promote the best delivery of health care. *See* 42 U.S.C.A. §§ 1320c to 1320c-19 (West 1991) (enacting PSROs).

fifty states have enacted peer review statutes that protect confidentiality and provide immunity to hospitals and those who participate in peer review activities.[5] The purpose of these protections is to encourage peer review activity, which will result in improved health care by lowering costs and raising quality.[6]

B. Ohio's Law As to the Accrual of Negligent Credentialing Claims Prior to the *Browning* Decision

Before the Ohio Supreme Court's judgment here, numerous cases, including Respondents' respective actions for negligent credentialing against Petitioner, were summarily adjudicated by several different trial court judges as time-barred under the established "discovery rule" for Ohio medical malpractice cases, as reiterated just four years ago in *Allenius v. Thomas,* 42 Ohio St. 3d 131, 538 N.E.2d 93 (1989).[7]

Allenius represented the culmination of a succession of Ohio Supreme Court cases applying the discovery rule to Ohio Revised Code § 2305.11(B)(1), the one-year statute of limitations for "medical claims." In Ohio, a "medical claim" includes "any claim that is asserted in any civil action against a physician, podiatrist, or hospital, . . . and that arises out of the medical diagnosis, care, or treatment of any person." Ohio Rev. Code § 2305.11(D)(3) (Anderson Supp. 1992). The *Allenius* court held that:

> [A cause of action accrues when there is] an occurrence of a "cognizable event" which does or should

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[5] *See A Compendium of State Peer Review Immunity Laws* (American Medical Association), 1988, at vi.

[6] *See* Note, *Medical Peer Review Protection in the Health Care Industry*, 52 Temple L. Q. 552 (1979). Moreover, certain provisions of the federal HCQIA (*e.g.*, 42 U.S.C.A. § 11137 (West Supp. 1993)), and hospital accreditation guidelines underscore the prominence of confidential hospital peer review activities in national health care improvement policies.

[7] The cases in which the trial courts granted summary judgment to SEMC on the statute of limitations issue, and which were pending when the Ohio Supreme Court rendered its decision, below, are designated in the Appendix, *infra*, A-114.

> lead the patient to believe that the condition of which the patient complains is related to a medical procedure, treatment or diagnosis previously rendered to the patient and where the cognizable event does or should place the patient on notice of the need to pursue his possible remedies.

42 Ohio St. 3d at 133, 538 N.E.2d at 96 (explaining *Hershberger v. Akron City Hosp.*, 34 Ohio St. 3d 1, 516 N.E.2d 204 (1987)).

As discussed above, various Ohio trial courts summarily disposed of several of these Dr. Burt-related negligent credentialing claims against SEMC as being *untimely* under the *Allenius* standard. Therefore, the additional question of whether SEMC was *immune from liability* under Ohio or federal peer review statutes was not raised by any party. In the first of the Dr. Burt-related cases to be decided on appeal, the trial court's grant of summary judgment in favor of SEMC was affirmed on the basis of the statute of limitations. The court of appeals reasoned that the plaintiffs' causes of action in that case against Dr. Burt and SEMC accrued contemporaneously, and that their lawsuit was untimely under the *Allenius* discovery rule. *See Hanks v. Burt*, No. 12257, 1991 WL 6312 (Ohio App. Jan. 25, 1991), *jur. mot. overruled*, 61 Ohio St. 3d 1413, 574 N.E.2d 1076 (1991). (*See* Appendix, *infra*, A-108.)

Subsequently, however, the Ohio Supreme Court abrogated these established principles as to the accrual of claims against health care providers and undermined the important health care policies embodied in state and federal peer review laws when it issued its unprecedented judgment in the instant case, which was consolidated from the separate actions of *Jimmie Dean Browning, et al. v. James C. Burt, M.D., et al.* and *Coney Mitchell v. James C. Burt, M.D., et al. See* 62 Ohio St. 3d 1502, 583 N.E.2d 973 (1992). Its judgment as to both cases is discussed below.

II. PROCEDURAL AND FACTUAL POSTURE

A. *Jimmie Dean Browning, et al. v. James C. Burt, M.D., et al.* – in the Lower Courts

Respondents Jimmie Dean and Lawrence Browning filed their complaint on April 17, 1989 against Petitioner SEMC, Dr. Max Blue, and Dr. James Burt for injuries which Respondents allegedly sustained from multiple surgeries performed on Ms. Browning by Drs. Blue and Burt at SEMC from 1982 to 1986. Respondents alleged that these defendant physicians, as members of SEMC's medical staff, performed unnecessary surgery on Ms. Browning without her consent.[8]

Drs. Burt and Blue performed surgery which consisted of an exploratory laparotomy, vaginal reconstruction, circumcision of her clitoris and insertion of a urinary catheter in February of 1982. Two weeks before the 1982 vaginal reconstruction surgery, Ms. Browning was advised, through a letter on SEMC stationery, that the Executive Committee of SEMC's Medical Staff had reviewed the surgery which she was about to undergo and considered it to be an "unproven, non-standard practice of gynecology." After acknowledging the receipt of this information, however, Ms. Browning consented to the surgery in writing. After this surgery, Ms. Browning allegedly developed a myriad of unusual and exacerbated symptoms and underwent a number of additional surgeries performed by Dr. Blue up through 1987.

Despite being advised as early as 1982 that the Executive Committee considered Dr. Burt's surgery to be "unproven" and "non-standard," Ms. Browning purportedly did not begin to investigate her concern over the medical treatment rendered at SEMC until June of 1987. Then, she went to other health care providers at the Cleveland Clinic, where she was

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[8] Petitioner and Dr. Blue answered separately, each denying liability and specifically raising the statute of limitations as a defense. Because Dr. Burt failed to answer, the Brownings' motion for default judgment against him was granted on July 21, 1989; that order, however, did not determine a specific monetary recovery against Dr. Burt.

told that there had been a "flaw" in her surgery. Ms. Browning admitted that, since August of 1987, she believed that malpractice had been committed.

After Ms. Browning's discovery deposition was taken in this case, SEMC and Dr. Blue separately filed motions for summary judgment based on the statute of limitations. The trial court found that Respondents' claims accrued, at the latest, in August, 1987. Because their action was filed a year and eight months thereafter, the court granted SEMC's motion for summary judgment, concluding the action was untimely under Ohio's one-year medical claim statute of limitations. (*See* Appendix, *infra*, A-96.) On February 2, 1990, the trial court issued a similar ruling dismissing Respondents' claims against Dr. Blue.[9]

The Browning Respondents appealed to the Ohio Court of Appeals for the Second Appellate District. In a decision issued on August 20, 1991, the court of appeals affirmed the summary judgment dismissing Ms. Browning's claims against Dr. Blue, but reversed the trial court's grant of summary judgment in favor of SEMC. (*See* Appendix, *infra*, A-77.) The appellate court agreed with the parties and the trial court that Ohio's medical claim statute of limitations was applicable to Ms. Browning's claims against SEMC and Dr. Blue. (*Id.*, at A-80-81.) Moreover, the appellate court agreed that Ms. Browning's medical claim *against Dr. Blue* accrued, at the latest, in August, 1987. Thus, it affirmed the trial court's judgment that Ms. Browning's action against Dr. Blue was barred by the one-year statute of limitations. (*Id.* at A-86-87.)

Nevertheless, the court of appeals ruled that Ms. Browning's medical claim against SEMC was not time-barred – even though Respondents had contended that their claims as to the various Defendants accrued contemporaneously. According to

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[9] The court granted these motions for summary judgment despite an affidavit filed by the Respondents, which stated that in October, 1988, Ms. Browning watched a *West 57th Street* television program which revealed that Dr. Burt had performed his surgery upon numerous other patients; according to Ms. Browning, that program marked the time she first suspected that malpractice had taken place.

the appellate court, Ms. Browning may not have had sufficient facts to place her on notice of SEMC's specific negligence until October, 1988 when she viewed a *West 57th Street* television program about Dr. Burt. (*Id.* at A-89.)

SEMC timely appealed to the Ohio Supreme Court. Respondents did not appeal the ruling upholding the dismissal of Ms. Browning's malpractice claim against Dr. Blue and, therefore, that aspect of the case is final.

B. *Coney Mitchell v. James C. Burt, M.D., et al.* – in the Lower Courts

Respondent Mitchell's Complaint, captioned one for "Medical Malpractice," was filed on December 14, 1988; it is similar to that filed by Respondent Browning, except that in addition to SEMC, Ms. Mitchell sued only one Co-Defendant – James Burt, M.D. In her deposition, Respondent Mitchell testified that she underwent the surgery at issue on January 23, 1985, at SEMC. It is undisputed that, prior to undergoing surgery, Ms. Mitchell signed an identical consent form as appears in the record in *Browning*.

After the surgery, Ms. Mitchell contended that her pre-existing problems worsened and that she developed urinary incontinence and constant bladder pain. Several weeks after the surgery, Ms. Mitchell purportedly examined her genitalia and discovered that, in her words, her vagina "was covered over" and "sewn up." She repeatedly complained to Dr. Burt regarding this problem, and eventually had a "heated argument" with him on this topic before she terminated her physician-patient relationship with him in 1987.

After taking Ms. Mitchell's deposition, SEMC filed a motion for summary judgment based on the statute of limitations. In response, Ms. Mitchell provided an affidavit, just as Respondent Browning had, inferring that she did not suspect any malpractice until she had viewed the October, 1988 *West 57th Street* television program. The trial court, nevertheless, found that Ms. Mitchell's causes of action accrued in 1985 when she knew about the changed appearance of her vaginal area and believed that she was experiencing new medical

problems. Thus, the trial court determined that Respondent Mitchell's claim against SEMC was not filed within the one-year period of limitations and was therefore time-barred. (*See* Appendix, *infra*, at A-103.)

Respondent Mitchell appealed. On August 26, 1991, the appellate court issued its separate Opinion and Entry. (Appendix, *infra* at A-91.) The court rejected Respondent's arguments, but reversed the judgment favoring SEMC, citing as authority its decision of August 20, 1991 in *Browning v. Burt*. SEMC then filed its timely appeal to the Ohio Supreme Court.

C. *The Consolidated Appeals Before the Ohio Supreme Court*

In the Ohio Supreme Court, SEMC contended that the court of appeals erred in reversing the trial courts' grants of summary judgment. *The parties stipulated that Ohio's decisional law as to the medical claims statute of limitations, Ohio Revised Code § 2305.11(B)(1), controlled SEMC's appeal.* Thus, the *only* question properly before the Ohio Supreme Court was whether the medical claim discovery rule – the "cognizable event" rule – had been applied properly to the facts of these cases.

On June 30, 1993, the Ohio Supreme Court affirmed on other grounds the separate opinions of the court of appeals. *Browning v. Burt*, 66 Ohio St. 3d 544, 563, 613 N.E.2d 993, 1008 (1993) (hereafter, "*Browning II*"). Its four substantive rulings and its "Conclusion" as to SEMC, however, go far beyond the narrow issue posed by these two cases and constitute rulings upon questions which were neither fully briefed nor argued.

First, the court held that Respondents' claims against SEMC were not "medical claims" arising out of the "medical diagnosis, care, and treatment" of these patients under Ohio Revised Code § 2305.11(D)(3); rather, the court held that negligent credentialing claims are ordinary negligence claims. *Id.* at 558, 613 N.E.2d at 1004. Thus, contrary to the conclusions of the parties and the lower courts in the proceedings below (as well as the parties and trial courts in several other

related cases in which summary judgment was granted to SEMC on limitations grounds), the Ohio Supreme Court ruled that Ohio's two-year statute of limitations in Ohio Revised Code § 2305.10 governed instead of the medical claims statute (allowing one year) found within Ohio Revised Code § 2305.11(B)(1). *Id.*

Second, although it claimed to be "borrowing" from the "cognizable event" discovery rule established for medical malpractice cases in *Allenius v. Thomas* (*id.* at 559, 613 N.E.2d at 1005), the Ohio Supreme Court "constructed" a new "alerting event" discovery rule for negligent credentialing claims, holding:

> [A] cause of action for negligent credentialing arises when the plaintiff knows or should know that he or she was injured as a result of the hospital's negligent credentialing procedures or practices.

Id. at 560, 613 N.E.2d at 1006. It further stated that:

> It is sufficient if a plaintiff discovers or, through the exercise of reasonable diligence, should have discovered some definitive information that would reasonably warrant investigation of the hospital's credentialing practices.

Id. at 561, 613 N.E.2d at 1006.

Third, the Ohio Supreme Court's majority expressed its belief that Respondents' executions of the "special consent form" just prior to their surgeries, and their awareness of the multiple medical problems that arose almost immediately thereafter, were probably insufficient to cause their claims against SEMC to arise under this new discovery test. *Id.* at 560-61, 613 N.E.2d at 1006.[10] They believed instead that Respondents' claims did not accrue until the claimants viewed the television program about other patients who had been treated by Dr. Burt. *Id.*

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[10] On the other hand, Chief Justice Moyer (joined by Judge Cook) concluded that the special consent form, in conjunction with Plaintiffs' injuries, was sufficient on its own *as a matter of law* to begin the running of the statute of limitations, even under the majority's new discovery rule. *Id.* at 570, 613 N.E.2d at 1012.

Fourth, although the issue was not ripe for its consideration, the Ohio Supreme Court stated that Ohio's peer review immunity statute, despite its express language to the contrary, does not immunize *hospitals* from liability on negligent credentialing claims.[11] Thus, without the benefit of full briefing or arguments of the parties, and without notice to the parties, the Ohio court rendered its *sua sponte* decision.

Finally, after setting forth its substantive holdings as to whether Respondents' claims against SEMC were filed, as a matter of law, outside the statutory period of limitations, *the only issue which had been before that, or any, court in this matter*, the Ohio Supreme Court majority wrote the following "Conclusion":

> [W]e do not pass judgment (since issues of alleged liability are yet to be determined) on Dr. Blue or SEMC, although it is tempting to do so given what the record shows has happened to these two women. Perhaps now they, *and others*, will have their day in court, *where the conspiracy of silence in the local medical community which permitted the atrocities to be committed, and the atrocities themselves, can be more fully explored.*

Id. at 565, 613 N.E.2d 1008-09. (Emphasis added.)

In a timely motion for rehearing, SEMC specifically argued that the Ohio Supreme Court's decisions, as to (1) the retroactive application of the new limitations rule and (2) the unavailability of Ohio's statutory peer review immunity defense, effectively deprived it of any meaningful opportunity to defend itself on these (and other) negligent credentialing

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[11] In the courts below, neither the *Browning* nor *Mitchell* parties presented the question of whether Ohio Revised Code § 2305.25 conferred immunity upon hospitals (or peer review participants) in a negligent credentialing case. That question was *not* raised as an issue in the trial court, nor did the court of appeals address it. Although SEMC, and the Ohio Hospital Association (as *amicus*), made passing references to that provision in briefs submitted to the Ohio Supreme Court (in footnotes), none of the propositions of law or assignments of error raised by the parties in the Ohio Supreme Court or Ohio Courts of Appeals involved any aspect of Section 2305.25.

claims in violation of the due process guaranty of the Fourteenth Amendment of the United States Constitution. (*See* Appendix, *infra*, A-3.) Additionally, SEMC requested that the Ohio Supreme Court rehear this matter to correct the impression of judicial partiality and prejudgment of the merits of this case which would be inferred from the language used by the majority in its "Conclusion." SEMC argued that such bias denied it due process of law under the guaranty of the Fourteenth Amendment.

On August 25, 1993, the Ohio Supreme Court denied, without opinion, SEMC's petition for rehearing.[12] Because the Ohio Supreme Court's judgment not only affirmed the court of appeals on different grounds, but also represented rulings on matters that were not addressed in the trial or appellate courts' opinions below, SEMC's petition for rehearing was its first opportunity to raise these substantial federal constitutional questions. *See Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673 (1930).

REASONS FOR GRANTING THE WRIT

Unless this Court reviews and vacates the judgment below, the Ohio Supreme Court's rulings will have deprived Petitioner, SEMC, of "due process in the primary sense" because it has not had, nor will it ever have, a full and fair opportunity to present its case in defending against these claims. *See Brinkerhoff-Faris*, 281 U.S. at 681. Because these rulings have so impaired SEMC's ability to raise meaningful defenses, there is a substantially increased risk that liability will be imposed based upon an erroneous and incomplete record. Such a result is antithetical to the basic rules of justice embodied in the Constitution. U.S. Constitution, Amend. XIV, § 1. *See, e.g., Mackey v. Montrym*, 443 U.S. 1, 13 (1979);

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[12] The Ohio Supreme Court issued separate orders denying SEMC's Motion for Rehearing. *See Browning v. Burt*, 67 Ohio St. 3d 1439, 617 N.E.2d 688 (1993) (entry denying rehearing) and *Mitchell v. Burt*, 67 Ohio St. 3d 1439, 617 N.E.2d 688 (1993) (entry denying rehearing). (Copies of these orders appear in the Appendix, *infra*, A-1 – A-2.)

Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 12-13 (1979); *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

Moreover, the rulings below deprive all Ohio hospitals of any meaningful way to defend negligent credentialing claims and undermine important federal and Ohio policies intended to assure quality medical care to the public. These substantial and novel constitutional questions merit this Court's review and, ultimately, vacation of the rulings below. *See* Sup. Ct. R. 10.1 (c).

I. This Court Should Decide Whether the Abolition of Peer Review Immunity for Ohio Hospitals Deprives Those Hospitals of Any Meaningful Opportunity to Defend "Negligent Credentialing" Claims and Contravenes the Vital Public Interest in Protection of Medical Peer Review.

Analytically, a plaintiff in a "negligent credentialing" claim must show that a hospital granted or continued staff privileges to an incompetent physician. *See Albain*, 50 Ohio St. 3d at 258, 553 N.E.2d at 1045. The required proof for the *prima facie* case might include only (1) proof of the holding of staff privileges by the physician in question, and (2) actual or constructive knowledge on the part of the hospital that the physician had developed a "pattern of incompetence which the hospital *should have become aware of* through its peer-review process." *See id.* (emphasis added). Thus, a plaintiff's *prima facie* case as to negligent credentialing may be satisfied without the need to resort to evidence of the *actual* credentialing procedures which had occurred at the hospital.

An adequate defense of any such suit, on the other hand, must, in fairness, allow the introduction of proof by the hospital that a reasonable investigation of a physician's qualifications and continued competence actually occurred, as foundation for proof that the decision which resulted from the peer review process (i.e. the credentialing or retention of the physician involved) was a reasonable one. However, under Ohio law (and notwithstanding the opinion of the Ohio

Supreme Court in *Browning II*), neither the details of the investigation nor the opinion(s) which resulted from the investigation may be disclosed by a hospital such as SEMC in its own defense. This is true because Ohio Revised Code § 2305.251 expressly provides, in pertinent part:

> Proceedings and records [of peer review committees] shall be held in confidence and shall not be subject to discovery or introduction in evidence in any civil action against . . . a hospital . . . arising out of matters which are the subject of evaluation and review by the committee. No person in attendance at a meeting of a review committee or serving as a member of a review committee shall be permitted or required to testify in any civil action as to any evidence or other matters produced or presented during the proceedings of the committee or as to any finding, recommendation, evaluation, opinion, or other action of the committee or member thereof.

In other words, in attempting to defend a negligent credentialing claim, a hospital and the members of its peer review committees cannot offer any evidence as to what they *actually* did to evaluate the physician or what they knew or did not know in reaching that credentialing decision. Under *Browning II*, however, a hospital would have no credentialing immunity and yet would have to defend its credentialing decisions without being permitted to introduce proof of those matters which the committees considered or the opinion(s) of the committee members upon which the hospital reasonably relied in acting upon the committees' recommendations; it is, therefore, disabled from presenting the very exculpatory evidence necessary to show that its actions in retaining the physician on its staff were reasonable.

As discussed *supra*, pp. 3-4, Ohio's peer review immunity provisions are consistent with those of virtually all states and the federal government. Such provisions reflect the broad recognition that peer review can fulfill its vital role in improving the quality of medical care only if hospitals and other participants in peer review activities engage in self-critical analysis unencumbered by fears of liability.

The opinion of the *Browning II* court, despite the clear intent of the Ohio Legislature, revives this inherent conflict in Ohio's peer review laws, and, in so doing, violates the federal due process rights of SEMC to raise every available defense. *See generally Lindsey v. Normet*, 405 U.S. 56, 66 (1972), *citing American Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932); *Nickey v. Mississippi*, 292 U.S. 393, 396 (1933). Additionally, the duties imposed by the *Browning II* court, viewed in light of Ohio and federal health care policy, require Ohio hospitals to rely upon the physician peer reviewers (who remain immune), and to accept sole responsibility for their activities, while being forbidden to defend "negligent credentialing" claims with proof that the peer review process and final decision were reasonable in a given case. Such a situation, very simply, is fundamentally unfair.

Accordingly, by abolishing the immunity of Ohio hospitals for peer review activities, and at the same time failing to consider the privilege for peer review information, the *Browning II* court exposes SEMC to substantial liability while depriving it of any real opportunity to defend claims of negligent credentialing.[13] Such manifest injustice is abhorrent to fundamental notions of due process. *See Mackey*, 443 U.S. at 13.

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[13] Furthermore, the hospital in such cases is put in the position of being charged with failure to adequately evaluate a physician's performance (manifestly a duty which can only be owing from one qualified to conduct such an evaluation [i.e. a physician]), while being technically unable (by virtue of its lack of qualifications in that regard) to do so. *See* Note, *Restructuring Hospital-Physician Relations:Patient Care Quality Depends on the Health of Hospital Peer Review*, 51 U. Pitt. L. Rev. 1025, 1032 (1990) (arguing that because hospital administrators are technically unable to review the technical aspects of a physician's qualifications and practice, hospital administrators must necessarily accept the peer review committee's conclusions and recommendations). In the words of the *Browning II* court, "[a] *hospital* does not practice medicine and is incapable of committing malpractice." 66 Ohio St. 3d at 556, 613 N.E.2d at 1003, *citing Lombard v. Good Samaritan Medical Center*, 69 Ohio St. 2d 471, 433 N.E.2d 162 (1982); *Richardson v. Doe*, 176 Ohio St. 370, 199 N.E.2d 878 (1964). In a decision released the same day as *Browning II*, the Ohio Supreme Court declared that "because they are prohibited from practicing medicine, hospitals . . . cannot pass on the efficacy of a course of treatment." *Berdyck v. Shinde*, 66 Ohio St. 3d 573, 580, 613 N.E.2d 1014, 1021 (1993).

This Court's review of the peer review immunity issue is vital because of the substantial constitutional and public policy questions involved. Moreover, that the *Browning II* majority *sua sponte* elevated the discussion of peer review immunity under Ohio Revised Code § 2305.25 from a passing reference in one footnote in the brief of SEMC to the syllabus law of the case also impaired SEMC's right to raise every available defense. *See, generally, Lindsey*, 405 U.S. at 66. As a matter of basic fairness to the parties (and all Ohio hospitals that will be affected by the sweeping decision below), this peer review immunity issue, with all its concomitant due process and health care policy implications, assuredly must not be decided without, at least, full argument by the parties to the litigation.

II. This Court Should Decide Whether the Ohio Supreme Court's "Alerting Event" Discovery Rule Governing the Accrual of "Negligent Credentialing" Claims, as Applied Retroactively, Deprives Ohio Hospitals of Due Process.

The Ohio court majority also announced a new discovery rule specifically tailored for negligent credentialing claims against hospitals, and, for the first time, has declared that such claims are controlled by Ohio's general negligence statute of limitations instead of its medical claim statute of limitations. The retroactive application of this new discovery rule, using a different statute of limitations, to revive the claims of Respondents, posed an additional violation to SEMC's right to due process under the Fourteenth Amendment of the Constitution.

The fundamental unfairness of any retroactive application of the majority's new limitation rules for negligent credentialing claims is readily apparent under *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). In *Chevron*, this Court held that three factors should be considered in deciding whether due process requires that a judicial decision be applied non-retroactively:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, . . . , or by deciding an issue of first impression whose resolution was not clearly fore-shadowed, . . . Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." . . . Finally, we have weighed the inequity imposed by retroactive application,. . . . .

Id. at 106-07 (citations omitted). For the following reasons, consideration of these factors clearly weighs against retroactive application of the Ohio Supreme Court's new discovery rule.

A. The Ohio Supreme Court's Holdings as to the Applicable Statute of Limitations as Well as the "Alerting Event" Accrual Rule for Negligent Credentialing Claims Established Two New Principles of Law.

The Ohio Supreme Court's *sua sponte* application of its *two-year* personal injury statute of limitations, rather than the *one-year* medical claims statute of limitations, obviously establishes a new principle of law. The parties had no quarrel with what was understood to be the settled, controlling law: they stipulated it. Several trial court judges who granted summary judgment in similar cases never envisioned the Ohio Supreme Court's novel rule applying the two-year statute of limitations; nor did the court of appeals which had affirmed a grant of summary judgment based on the statute of limitations in an earlier Dr. Burt case prior to issuing the decision in *Browning II*. *See Hanks v. Burt*, No. 12257, 1991 WL 6312 (Ohio App. Jan. 25, 1991). (*See* Appendix, *infra*, A-108). In fact, the court of appeals, in its separate *Browning* and *Mitchell* decisions, had concluded that the medical claims statute of limitations applied to Respondents' claims against SEMC.

See Browning II, 66 Ohio St. 3d at 560, 613 N.E.2d at 1005-06.

Before the *Browning II* decision was issued, Ohio courts consistently construed diverse claims against hospitals to be "medical claims." *See, e.g., Proctor v. Southwest General Hosp.*, 78 Ohio App. 3d 608, 605 N.E.2d 975 (1992) (claim for a hospital's failure to provide an "appropriate hospital setting, proper psychiatric care and treatment, and safe surroundings" falls within definition of "medical claim"); *Fazzone v. Western Reserve Care Sys.*, No. 90 C.A. 72, 1991 WL 124428 (Ohio App. July 2, 1991) (claim of negligent maintenance of an operating room by a hospital arises out of the "care" rendered to a patient for purposes of Ohio Revised Code § 2305.11(D)(3)) [copy attached, *infra*, Appendix D1]; *Raggazine v. St. Elizabeth Hosp. Medical Ctr.*, No. C.A. 129, 1991 WL 184817 (Ohio App. September 19, 1991) (claim that hospital employee improperly used a bedpan constitutes a "medical claim") [copy attached, *infra*, Appendix D5].

The decision below also conflicts with the law of other states. California and Michigan courts, for example, when faced with the same question have held that negligent credentialing claims are professional negligence claims – not "general negligence claims." *See Bronson v. Sisters of Mercy Health Corp.*, 175 Mich. App. 647, 652-53, 438 N.W.2d 276, 279 (1989) (explaining that the provision of professional care by a hospital includes decisions regarding selection and retention of its medical staff); *Bell v. Sharp Cabrillo Hosp.*, 211 Cal. App. 3d 1339, 260 Cal. Rptr. 37, 41, *modified on other grounds*, 212 Cal. App. 3d 1034, 260 Cal. Rptr. 886 (1989) (noting that because a hospital's effectiveness in selecting and reviewing the competence of its medical staff is a necessary predicate to delivering quality health care, its inadequate fulfillment of that responsibility constitutes "professional negligence" under California's malpractice statutes).

As these Michigan and California courts observed, and as the *Browning II* majority seemed to realize (but then, ruled contrarily), negligent credentialing claims are inextricably related to, and necessarily arise from, an underlying claim of medical malpractice against a physician practicing at the

defendant hospital. *See* 66 Ohio St. 3d at 557-58, 613 N.E.2d at 1004; *see also id.*, at 567, 613 N.E.2d at 1010 (Moyer, C.J., concurring in part and dissenting in part). Under these circumstances, therefore, SEMC reasonably relied upon the fact that, under prior pronouncements of law, Respondents' claims against it were "medical claims."

A second, unexpected change in Ohio law occurred when the Ohio Supreme Court in *Browning II* neglected both the letter and spirit of its prior pronouncements on the "discovery rule" in medical and non-medical cases by creating an "alerting event" discovery rule. The Ohio Supreme Court now holds that a cause of action for negligent credentialing against a hospital does not accrue until the patient is (or should be) aware of the specific negligence committed by the defendant hospital, *i.e.*, (1) the legal duty owed to her by the hospital as regards credentialing of physicians; and (2) the hospital's breach of that duty. *See id.* at 560-61, 613 N.E.2d at 1006.

This new "alerting event" rule abandons the established law of Ohio as to the accrual of claims against health care providers – that such claims accrue upon discovery of the injury. This rule was first established in *Oliver v. Kaiser Community Health Foundation*, 5 Ohio St. 3d 111, 117, 449 N.E.2d 438, 443-44 (1983). Subsequently, the Ohio Supreme Court adhered to a discovery-of-the-injury accrual rule; it specifically, and repeatedly, rejected the contention that discovery-of-the-specific-negligence (malpractice) or discovery-of-the-"legal injury" had to occur for such a claim to accrue. *See, e.g., Allenius v. Thomas*, 42 Ohio St. 3d 131, 538 N.E.2d 93 (1989); *Hershberger v. Akron City Hospital*, 34 Ohio St. 3d 1, 4-5, 516 N.E.2d 204, 207 (1987); *Hoffman v. Davidson*, 31 Ohio St. 3d 60, 508 N.E.2d 958 (1987); *Richards v. St. Thomas Hospital*, 24 Ohio St. 3d 27, 28, 492 N.E.2d 821, 823 (1986).

Thus, contrary to its suggestion that it was "borrowing" from *Allenius* when it created its novel "alerting event test" herein, *Browning II*, 66 Ohio St. 3d at 559, 613 N.E.2d at 1005, the Ohio Supreme Court broke totally new and unanticipated ground when it determined that discovery of a hospital defendant's specific negligence would be necessary to

trigger the statute of limitations at issue herein. *See id.* at 568-69, 613 N.E.2d at 1010-11 (Moyer, C.J., concurring in part and dissenting in part).

Moreover, before now, the medical claims "cognizable event" discovery rule represented Ohio law as to the accrual of various personal injury causes of action for which *any* discovery rule was available. For example, the Ohio Supreme Court expressly adapted the medical claims discovery rule for latent disease cases, which are subject to Ohio's distinct personal injury statute of limitations, Ohio Revised Code § 2305.10 (which statute the Ohio Supreme Court now holds to be applicable to negligent credentialing claims). *See O'Stricker v. Jim Walter Corp.*, 4 Ohio St. 3d 84, 90, 447 N.E.2d 727, 732 (1983). Thus, the Ohio Supreme Court's rulings that the "alerting event" test should be applied to the personal injury statute of limitations, singularly and cumulatively, marked a drastic change in Ohio law.

B. The Retroactive Application of the Ohio Supreme Court's Alerting Event Discovery Rule Retards Important Policies Underlying the Statute of Limitations.

The Ohio Supreme Court majority gave no reason for departing from the traditional discovery rule for tort actions when it fashioned its unique "alerting event" test to revive Respondents' negligent credentialing claims against SEMC. Ohio's prior, well established discovery rule for medical and non-medical personal injury claims was adopted to mitigate the harsh consequences for potential plaintiffs occasioned by strict adherence to the limitation period; a discovery-of-injury rule, therefore, permitted recovery in those situations in which the potential plaintiff had no reason to investigate her claims earlier when she did not know that she had been injured. *O'Stricker*, 4 Ohio St. 3d at 90, 447 N.E.2d at 732. Such reasoning, apparently, also convinced this Court to adopt a similar discovery-of-injury rule for federal claims. *United States v. Kubrick*, 444 U.S. 111, 122-23 (1979).

Such a policy of preserving claims of those potential plaintiffs who do not even know they had been injured makes sense, and protects those potential plaintiffs' rights to pursue their remedies. *See, e.g., id.* at 120 n.7 (explaining that in actions under the Federal Employers' Liability Act, fairness requires that a plaintiff's cause of action does not accrue until there is discovery of the injury in cases in which an "unknown and unknowable" injury has not manifested itself). Those values, however, would be amply, and fairly, addressed simply by adhering to the traditional "discovery-of-injury" rule for negligent credentialing claims. Instead, however, the new "discovery-of-injury-and-specific-negligence" test has been developed by the Ohio Supreme Court without any additional justification, to the unfair prejudice of a defending Ohio hospital.

The retroactive application of the new alerting event discovery test undermines the purpose of statutes of limitation. As this Court has recognized, statutes of limitations "represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified time and that 'the right to be free from stale claims in time comes to prevail over the right to prosecute them.' " *Kubrick,* 444 U.S. at 117 (quoting *Railroad Telegraphers v. Railway Express Agency,* 321 U.S. 342, 349 (1944)). As further noted in *Kubrick*:

> These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.

Id. (citing, *inter alia, United States v. Marion,* 404 U.S. 307, 322, n.14 (1971); *Burness v. New York Central R. Co.,* 380 U.S. 424 (1965)).

Similarly, before now, Ohio law also reflected the basic tenet that fundamental fairness to defendants required that

claims must be brought in a timely fashion. In *O'Stricker*, the Ohio Supreme Court aptly stated:

> The rationale underlying statutes of limitations is fourfold: to ensure fairness to defendant; to encourage prompt prosecution of causes of action; to suppress stale and fraudulent claims; and to avoid the inconvenience engendered by delay, specifically the difficulties of proof present in older cases.

4 Ohio St. 3d at 88, 447 N.E.2d at 731, *citing Harig v. Johns-Manville Products Corp.*, 284 Md. 70, 75, 394 A.2d 299, 302 (1978).

The Ohio Supreme Court majority's special discovery rule for negligent credentialing claims against hospitals totally undermines the important policies underlying statutes of limitations. *Browning II* effectively eliminates any requirement for a plaintiff to promptly investigate possible remedies – even though she knows of her injuries and should suspect that they were caused by the negligence of another.

Under the unprecedented standard announced in *Browning II*, accrual is so divorced from pain and injury – signs that a lay person can understand and act upon – that "discovery" may never occur, excepting sheer coincidence or affirmative efforts by third persons to foment litigation. In these cases, for example, the only evidence which the Ohio Supreme Court's majority thought might establish "discovery" of SEMC's specific negligence was the Respondents' acknowledgements that in October of 1988, they had watched a television program about Dr. Burt. Ironically, if they had denied seeing the program (candidly or otherwise), or if the case were of less notoriety and not subject to extensive media attention, according to the Ohio Supreme Court, "discovery" would not have occurred even at that time, and perhaps not for years or decades thereafter – if ever. Such a discovery rule irrationally undermines the policies underlying statutes of limitation.

Additionally, the toll, in hospital costs, of the increased liability exposure of Ohio hospitals under *Browning II* will be

significant. One commentator, discussing the "crisis" in medical malpractice insurance which occurred in the mid-seventies, attributed the rise in hospital malpractice insurance premiums (from $ 28.7 million in 1960 to $ 145.5 million in 1974), in part, to changes in legal rules and doctrine which made it easier for a medical malpractice plaintiff to pursue a claim, including the prolongation of statutes of limitations through the "discovery rule."[14] The fundamental changes in Ohio law effected by the *Browning II* decision will likewise inevitably contribute to the spiralling cost of hospital care in Ohio.

C. The Retroactive Application of the "Alerting Event" Discovery Rule Would be Inequitable.

The inequity of retroactive application here is also readily apparent. This situation is strikingly similar to that presented in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930). In *Brinkerhoff-Faris*, the plaintiff brought suit in a Missouri court to defend against a tax assessment. On appeal, the Supreme Court of Missouri overruled the prior well-established rule that the state tax board had no jurisdiction to hear appeals, and held that the plaintiff therein was not entitled to relief because it had failed to exhaust its newly created administrative remedies. *Id.* at 675. In *Brinkerhoff-Faris*, this Court held that the Missouri court's retroactive rule violated due process of law because plaintiff was denied an opportunity to defend against the tax assessment. It held that such a denial amounts to a deprivation of property without due process of law. *Id.* at 679.

Here, retroactive application of the Ohio Supreme Court's "alerting event" rule changes well-established law with respect to the statute of limitations. Until this case, there

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[14] *See* Kendall, *Expectations, Imperfect Markets, and Medical Malpractice Insurance* in THE ECONOMICS OF MEDICAL MALPRACTICE 167, 176-80 (S. Rothenberg, ed. 1978). Additional explanations for the rise in malpractice claims cited by the author include the abolition of charitable and governmental immunity, abandonment of the "locality rule," application of *respondeat superior*, and application of the doctrine of informed consent. *Id.*

was no reason for hospitals to preserve records, keep track of witnesses, or otherwise stand ready to defend credentialing decisions of many years past because potential claims were barred under any known interpretation of the applicable statute of limitations.

Moreover, the drastic new discovery rule for hospitals clearly will put such defendants at an unfair and inordinate disadvantage in defending negligent credentialing claims. As explained above, one element of a negligent credentialing claim is that there was malpractice by the physician in question. *See Albain*, 50 Ohio St. 3d at 258, 553 N.E.2d at 1045. Many years after the fact such claims may be impossible to defend, especially if the physician is unwilling to get involved or absent (as here in the case with Dr. Burt). The unfair prejudice to Ohio hospitals occasioned by the retroactive application of the new "alerting event" test is manifest considering that, as in these very cases, the allegedly negligent physician, who would be best able to defend the malpractice claim, very likely may be shielded by the statute of limitations (which accrues under Ohio's "cognizable event" test), and may choose to avoid the proceeding altogether.

Thus, in a negligent credentialing claim, the hospital is left to defend both the underlying malpractice and the credentialing claims alone, without the participation of the physician and likely without benefit of critical records that have been lost or destroyed years before. As a result, the hospital has no meaningful opportunity to tell its side of the story and bears a substantial risk that its liability for damages will be based on an erroneous and incomplete record. Such a result clearly violates the United States Constitution. *See Mackey*, 443 U.S. at 14.

This Court has explained that procedural due process rules are shaped by the risk of error inherent in the truth finding process as applied to the generality of cases, not simply the rare exceptions. *See Eldridge*, 424 U.S. at 344. If such a rule has continuing viability at all, this Court's review of this matter is warranted because the untoward and unconstitutional reach of the retroactive application of this new discovery rule extends far beyond SEMC in its defense of

these particular claims. Indeed, under this new rule, Ohio hospitals facing potential liability obtain no repose at all from the statute of limitations except, arguably, in a situation where a hospital's *prima facie* liability is obvious – something highly unlikely given the clear Ohio and federal policies, as explained above, which favor the strict confidentiality of peer review proceedings. Thus, except in the most notorious cases, the *Browning II* test produces an endless limitation period; in effect, no limitation period exists at all.

For these reasons, the retroactive deprivation of a meaningful opportunity for SEMC to fully defend itself constitutes an unwarranted denial of due process of law. *See Chevron*, 404 U.S. at 108-109. This Court, therefore, should grant SEMC's certiorari petition so that it may review and reverse the judgment below as to the new discovery rule for negligent credentialing claims in Ohio.

III. This Court Should Determine Whether the Ohio Supreme Court Has Demonstrated Pervasive and Unfair Prejudice in This Case, Thus Depriving St. Elizabeth Medical Center of Its Right to an Unbiased Decision Maker and Unfairly Impacting Its Defense in Pending Cases.

Due Process mandates that a court which hears cases and controversies not only must be unbiased, but must avoid even the appearance of bias. *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 150 (1968); *see also Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971); *In Re Murchison*, 349 U.S. 133, 136 (1955) *quoting Offutt v. United States*, 348 U.S. 11, 14 (1954). Fairness to SEMC requires the decision in this case to have been based upon the law and not upon emotion or a preconceived notion of how the cases should be resolved on the merits. Impartiality and the appearance of impartiality are the *sine qua non* of the American judicial system. *Haines v. Liggett Group*, 975 F.2d 81, 98 (3rd Cir. 1992), *quoting Lewis v. Curtis*, 671 F.2d 779, 789 (3rd Cir. 1982), *cert. denied* 459 U.S. 880 (1982).

The language of the majority's "Conclusion," as quoted *supra*, p. 11, demonstrates prejudgment of the merits of these cases. Although acknowledging these cases were not before the court on the merits, and notwithstanding the introductory language ("we do not pass judgment * * * on Dr. Blue and SEMC"), the opinion unequivocally declares that the "record shows" that the Respondents were victims of "atrocities," and that these "atrocities" were "permitted" by a "conspiracy" involving SEMC. *Browning II*, 66 Ohio St. 3d at 565, 613 N.E.2d at 1008-09. An atrocity is an atrocious act, and the use of this term plainly denotes contemptible conduct. A more clear-cut instance of prejudgment of the merits of a pending case can scarcely be imagined.

In *Haines v. Liggett,* the United States Court of Appeals for the Third Circuit considered the following analogous comments made by a district court judge in a published opinion adjudicating a discovery dispute:

> All too often in the choice between the physical health of consumers and the financial well-being of business, concealment is chosen over disclosure, sales over safety, and money over morality. Who are these persons who knowingly and secretly decide to put the buying public at risk solely for the purpose of making profits and who believe that illness and death of consumers is an appropriate cost of their own prosperity!
>
> As the following facts disclose, despite some rising pretenders, the tobacco industry may be the king of concealment and disinformation.

Haines, 975 F.2d at 97, *quoting Haines v. Liggett Group, Inc.*, 140 F.R.D. 681, 683 (D.N.J. 1992). Based upon this pronouncement, the Third Circuit directed the reassignment of the case to a different judge of the district court. Explaining, the court noted:

> The final decision to be rendered by an eventual jury here is whether petitioners, consisting of leading members of the tobacco industry, conspired to withhold information concerning the dangers of tobacco use from the general public. . . . This, we

> repeat, is the ultimate issue to be determined by a jury, as fact finders, after appropriate instructions given them by the trial judge.
>
> Measured against these precepts, it is impossible for us to vindicate the requirement of "appearance of impartiality" in view of the statements made in the district court's prologue to its opinion.

Id. at 98.

Just as in *Haines*, the opinion of the Ohio Supreme Court in this case belies the "appearance of impartiality" required of state courts under the Fourteenth Amendment to the United States Constitution. Indeed, whether "atrocities" were in fact, committed, and whether a "conspiracy of silence" arose, are issues which had not been fully litigated and, thus, would have to be submitted to the trier of fact for resolution. Accordingly, SEMC's federal right to an unbiased decision maker has been denied.

In addition to abridging SEMC's Constitutional due process rights by prejudgment of the merits of these cases, the opinion has worked a deprivation of SEMC's property rights through the likely effect of the published comments (and the publicity generated thereby)[15] upon these and other related cases now pending in Ohio courts.[16] This deprivation is even more likely since the court *specifically refers to cases not before it* when declaring that women had been victims of "atrocities:" "[p]erhaps now they, *and others*, will have their day in court . . . [.]" (Emphasis added.) *See Browning II*, 66 Ohio St. 3d at 565, 613 N.E.2d at 1009.

A case illustrating the problem is *Gardiner v. A.H. Robins*, 747 F.2d 1180 (8th Cir. 1984). In *Gardiner*, the Eighth Circuit reviewed comments of a district court judge

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[15] *See Ex-Patients of Burt Can Sue St. E's*, Dayton Daily News, July 1, 1993, at 1A; *'Love Doctor' Can Be Put on Trial, Court Rules*, Cleveland Plain Dealer, July 1, 1993, at 5B. Both news accounts reprinted the comments regarding "atrocities," and the "conspiracy of silence."

[16] A list of related cases involving both Dr. Burt and SEMC which were pending at the time of the Ohio Supreme Court's decision in *Browning II* is appended hereto at A-114.

made at a settlement hearing, at which the district court judge accused several officers of the defendant corporation of misconduct. The court held that this and similar conduct on the part of the district court judge violated the defendant's due process rights, explaining:

> As a party to the litigation, Robins was entitled to due process, the essence of which is a fair trial before a tribunal free from bias or prejudice. The record is clear that, at the time he issued the reprimand, Judge Lord had decided the merits of the underlying dispute against Robins, even though there had been no trial . . . Those comments in such a context exhibit a pervasive bias and prejudice as to deprive Robins of its due process right to a hearing before an impartial judge.

Id. at 1191-92 (citations omitted). Further, the court noted that the district court's comments deprived the defendant corporation of property interests protected by due process:

> Robins was entitled to due process not only as a litigant under the jurisdiction of the district court, but also because its property interests were implicated by Judge Lord's public reprimand. The reprimand has been used against Robins in other Dalkon Shield cases across the country, resulting in potential prejudice to Robins' litigation posture in those cases. The adverse publicity Robins has received from the public reprimand could conceivably have caused Robins other forms of property damages as well.
>
> *Id.* at 1191-92, n.16.

Just as in *Gardiner*, the comments of the majority in *Browning II* are certain to adversely affect SEMC's "litigation posture" in the forty-plus related pending cases in Ohio. As noted by the *Gardiner* court, "[a] trial judge's comments adverse to a party before trial commences can easily prejudice the minds of jurors and other judges." *Id.* at 1194.

The opinion of the Ohio Supreme Court in *Browning II* denied basic fair play to SEMC, by prematurely reaching and

improperly evaluating cases not presented for review on the merits. By suggesting that SEMC "permitted" the commission of "atrocities," the opinion has prejudged SEMC's defenses in these and dozens of similar Ohio cases. Accordingly, this petition should be granted so that the *Browning II* decision can be reviewed and vacated, and these consolidated cases can be remanded for an impartial rehearing to ensure that SEMC is accorded a full and fair opportunity to present its defenses.

CONCLUSION

Under the American system of justice, the adversary system usually provides a defending party with the process that is due because it is the best means for ascertaining the truth and minimizing the risk that an erroneous deprivation of property will occur. *Mackey*, 443 U.S. at 13. If these cases are left unreviewed by this Court, however, SEMC faces trial on the merits on these and dozens of other related cases prejudged and unable to fully and fairly defend itself in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution. *See id.* at 20 (Stewart, J., dissenting) ("This settled principle [of due process] serves to ensure that the person threatened with loss has an opportunity to present his side of the story . . . "). Such a result is patently unfair and subverts the truth finding process.

SEMC is not asking this Court to review and reverse mere judicial errors of state law. Rather, when, as in this case, SEMC has been subjected to a miscarriage of justice of such gravity and magnitude that should not be tolerated in "an enlightened system of justice," this Court's review of a state's highest court's rulings is needed to uphold Petitioner's rights to due process. *See Stein v. New York*, 346 U.S. 156, 181 (1953).

Moreover, if unchecked, Ohio's new rules of law for negligent credentialing claims will contravene important federal and Ohio health care quality improvement policies, and result in further escalation of hospital expenses and consumer costs. It is imperative, therefore, that this Court review, and

ultimately reverse, the several unconstitutional rulings of the Ohio Supreme Court, as outlined herein. It should then remand this matter for rehearing before an impartial panel for a full and fair consideration of these issues consistent with this Court's opinion.

Respectfully submitted,

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